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Beyond Reason: The Legal Importance of Emotions

Thom Brooks* & Diana Sankey**

1. Introduction

Deryck Beyleveld has forged a theory of ethical rationalism that has made an important impact on legal and moral philosophy—that this collection of essays makes clear. He has not only refined and improved the original account developed by Alan Gewirth, but provides us with ethical rationalism's most prolific defender today. One area of particular insight is Beyleveld's many applications of ethical rationalism to practice and, most especially, to medical law and ethics which has been especially influential.¹ This work has set the bar for all proponents and critics alike.

We focus narrowly on a specific concern that we have with ethical rationalism: its primacy of rationality over other characteristics, such as our emotions. This is not to deny the importance of reason in our thinking about law and ethical concerns. But we have concerns with any view that holds that reason is the only key to how any tensions should be resolved. Such a position claims for reason a privileged status it does not have or merit. One problem for us is that, in our view, ethical rationalism does not appear to adequately consider the importance of emotions and so it does not provide a satisfactory account of law and morality as a result. We examine this concern in the first part of our chapter.

This chapter's second part raises concerns with the application of ethical rationalism as a model for understanding sexual offences. We highlight both the need to foreground emotion in order to understand the current law, as well as the dangers from a normative perspective of appearing to marginalise the role of emotion in sexual offences. Not only would a prioritisation of rationality fail to reflect the role emotion can play in current rape law, but we would argue, is particularly problematic in this area of law in terms of promoting justice. In summary, Beyleveld's ethical rationalism exercises an important impact on legal theory and legal practices. Nonetheless, we raise some reservations about its connection to these impacts that lead us to support revisions to this approach.

2. Law and Ethical Rationalism

This section spells out a key concern we have about ethical rationalism. This is as a kind of rationalism that prioritises rationality over sensibility and the emotions. We outline how ethical rationalism is committed to this view in its defence of the Principle of Generic Consistency (PGC). We argue that this position should be revised so that it more clearly accounts for human beings as having both reason and emotions—and build on the importance of emotions for the law in section 3.

A. Rationalism or reasonableness?

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¹ For example, see D Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defence of Alan Gewirth's Argument to the Principle of Generic Consistency* (University of Chicago Press 1991); D Beyleveld, 'A Reply to Marcus G. Singer on "Gewirth, Beyleveld and Dialectical Necessity"' (2002) 15 *Ratio Juris* 458 and D Beyleveld and R Brownsword, *Consent in the Law* (Hart 2007).

Our first concern is that ethical rationalism prioritises one feature—rationalism—above others, including sensibility. To this end, our emotions do not appear to play any important role on a par with rationality with little, if any, substantive effect on ethical rationalism. This is a concern because it is unclear that rationalism can provide the solid foundation its proponents claim with consequences for the suitability of such an approach for thinking about the law.

Developed from original work by Alan Gewirth, Deryck Beyleveld's ethical rationalism develops Gewirth's conception of the PGC. Beyleveld's argument is dialectical and it has three stages.² The first stage begins with the position that agents claim—as agents—that they do (or intend to do) some act voluntarily for some purpose. This claim necessarily accepts that my purpose for acting is good, that my 'freedom and well-being are generically necessary conditions' of my having agency and that my freedom and well-being are 'necessary goods'.

At this stage of the argument, it does not matter what the purposes for acting might be.³ We consider agency only from 'the internal viewpoint' of an agent.⁴ Beyleveld claims the 'key question' here is to ask what an agent may do.⁵ But this question is to be answered only from a specific perspective: agents 'must be able to ask the question, "What is it rational or permissible for me to do?"'.⁶ Some purposes—namely, 'rational' purposes—count to the exclusion of others.

Stage two of the argument states that it is 'dialectically necessary' for an agent to consider 'that he has rights to the generic conditions of agency'.⁷ It is not enough that an agent can do some action for a chosen purpose. These generic conditions of voluntarily choosing an agent's actions are rights held by this agent. This appears to be explained by the fact that if an agent did not have rights to the generic conditions for her agency then her ability to exist as an agent might become compromised.⁸

Stage three of the argument for the PGC holds that it follows 'purely logically' that any agent must consider that all other agents have the same 'generic rights' in equal measure.⁹ Beyleveld states this view as 'It is merely because I am an agent that I have the generic rights'.¹⁰ Agents must necessarily possess generic conditions of their agency as rights—that are recognised by any other agent. But these logical manoeuvres consider agents in general, in terms of what is rational for any agent *in general* to do.

It is then unsurprising to find that Beyleveld defends the PGC it as a principle that 'is the supreme rational reference point for judging the permissibility of all actions'.¹¹ The PGC is '[l]ike Kant's argument for "the moral law"' and attempts to establish the PGC in a

² Beyleveld n1, at 13-46.

³ See D Beyleveld, 'The Principle of Generic Consistency as the Supreme Principle of Human Rights' (2012) 13 *Human Rights Review* 1, at 2 ('i.e., in order to pursue or achieve his own purposes, *regardless of what these might be*') (italics given).

⁴ Beyleveld n3, at 3.

⁵ Beyleveld n3, at 4.

⁶ Beyleveld n3, at 4.

⁷ Beyleveld n3, at 3.

⁸ See Beyleveld n3, at 5 ('generic damage to my capacity to act').

⁹ Beyleveld n3, at 3.

¹⁰ Beyleveld n3, at 5.

¹¹ See Beyleveld n3, at 2.

‘completely a priori’ way.¹² This is ‘not empirical’ as an exercise—it is explicitly rationalist. Beyleveld claims that we are to ask ‘What is it *rational* or permissible for me to do?’¹³ Only ‘reason’ is identified as being what ‘may require’ an agent ‘to do something only to the extent that he can do it’—not our emotional or other responses to circumstances.¹⁴ Not unlike the universalism of Kant’s moral law, Beyleveld argues ‘since all agents must accept parallel reasoning, it follows that the PGC is dialectically necessary for all agents’.¹⁵ A particular view of rationality rules to the exclusion of rival possibilities.

This brief sketch of the argument for the PGC usefully highlights the clear rationalist nature of this project—and the relative absence of emotions. What counts for the argument is that it should ‘follow purely logically’ from one stage to the next in a manner that relates to every individual the same.¹⁶ This logical path is the freeway of reason absent any clear influence of more twisting trails of emotions, sentimentality or inclination.

In *The Dialectical Necessity of Morality*, little mention is made of emotions beyond two short passages:

Gewirth does not deny feelings or emotions legitimacy. On the contrary, it could be said that the theory provides a specification of what constitutes rational emotions and feelings...Gewirth does deny the irrational...has legitimacy.¹⁷

It is true that particular occurrent emotions (or attitudes) are not employed as criteria for what is permissible. To do so would, however, beg the question against those with different attitudes.¹⁸

These brief passages express a clear view that feelings or emotions are not entirely irrelevant. It depends on whether they are ‘rational’ or not. So it is unimportant if an agent is motivated by any occurring emotional response because others might respond differently and, more specifically, in a non-rational way. It is our being ‘rational’ and thinking ‘logically’ that sets the terms for what is permissible under the PGC.

Emotions can factor into the argument only if they are consistent with rationality. Their relationship appears analogous to the relation between the rational and the reasonable in John Rawls’s political liberalism.¹⁹ For Rawls, the rational is defined by two principles of justice that any individual might accept under the specified conditions of a hypothetical original position. He recognises that the rational can set the boundaries for political decision-making, but not help us specify its content beyond constitutional essentials. This middle ground is the reasonable that exists within the bounds of rationality and cast as the use of public reasons that can connect more directly with the fact of reasonable pluralism—that any community will be composed of individuals with different conceptions of the good. So long as all are

¹² Beyleveld n3, at 3.

¹³ Beyleveld n3, at 3 (emphasis added).

¹⁴ Beyleveld n3, at 5.

¹⁵ Beyleveld n3, at 6.

¹⁶ See Beyleveld n3, at 6.

¹⁷ Beyleveld n1, at 159.

¹⁸ Beyleveld n1, at 444.

¹⁹ See J Rawls, *Political Liberalism*, paper edn, 48-53 (Columbia University Press 1996); and T Brooks, ‘The Capabilities Approach and Political Liberalism’ in T Brooks and MC Nussbaum (eds) *Rawls’s Political Liberalism*, 138–79 (Columbia University Press 2015) and S Freeman, *Rawls* (Routledge 2007) 324-64.

bound by the rational constraints discerned through the original position, free and equal citizens develop political liberalism through the use of public reason.

Similarly, Beyleveld's understanding of the PGC is that rationality sets the boundaries for what is permissible. Within these constraints, our emotions can have some role to play—although how this might work is underdeveloped and not specified. But what is clear is that emotions do not play a leading role and not 'employed as criteria for what is permissible'. This is left only to rationality—which appears to be understood as a commitment to the law of non-contradiction and general consistency across all agents although there are more than one understanding of what 'rationality' consists in as an essentially contested concept that is not neutral.²⁰

In sum, what counts for Beyleveld's ethical rationalism is to a large degree free from empirical attitudinal relations that people possess. Beyleveld's aim is to offer an account that is suitably universalistic to encompass any agent in principle, but we are unclear how well it accounts for agents in their concrete, everyday lives.

We believe Beyleveld's ethical rationalism can and should take greater account of our emotions. In the *Phaedrus*, Plato's allegory of the charioteer is used to help us imagine a charioteer steering two horses as they fly across the Earth.²¹ One horse is white and pulls the chariot towards the sky; the other is black and pulls the chariot down towards the ground. Plato argues that we each face these tensions between our ethereal rationality and grounded sentiment. We should not choose one or the other because we'll either rise so high we will burn in the sun like Icarus or come crashing back to Earth like a lead zeppelin. Instead, we should forge a middle path between them both through moderation. Humans are rational agents, but they are also emotional beings—and both of these aspects must be considered to grasp the human condition. To accept one and deny the other is to reject or ignore an important feature of who we are and so is incomplete and unsatisfactory. Our concern with ethical rationalism is that it runs this risk in prioritising rationality over emotions.

One model for this kind of moderation can be found in Martha Nussbaum's capabilities approach.²² She defends capabilities as our essential freedoms to do or be. They cover a wide range of individual capabilities from practical reason to the uses of our imagination. Nussbaum's argument is that any minimally decent human life must be guaranteed above some minimum threshold of capabilities across these different areas.²³ Capabilities are non-competitive: we cannot satisfy the threshold condition by having large capabilities in some areas but not others. Nussbaum rejects such trade-offs between capabilities on the grounds that each is a capability insofar as each is an essential freedom constitutive of a minimally decent life.²⁴ The satisfaction of the capabilities threshold need not require state intervention,

²⁰ See DP Green and I Shapiro, *Pathologies of Rational Choice Theory: A Critique of Applications in Political Science* (Yale University Press 1994); D Kahneman, *Thinking, Fast and Slow* (Penguin 2011) and A Hindmoor, *Rational Choice* (Palgrave Macmillan 2006).

²¹ Plato, 'The Phaedrus' in *Complete Works*, JM Cooper, ed (Hackett 1991) at 246a-254e.

²² See M Nussbaum, *Women and Human Development* (Cambridge University Press 2000).

²³ Nussbaum n22, at 6.

²⁴ This raises questions about whether any individual should be free to reject enjoying several or all capabilities—as Nussbaum argues we can—where the securing a minimal threshold of capability enjoyment across all capabilities is also argued to secure a minimally decent life. See T Brooks, 'A New Problem with the Capabilities Approach' (2014) 20 *Harvard Review of Philosophy* 100.

but it does require that the state ensure individuals can pursue capabilities above a threshold—even if they can choose not to do so.²⁵

The essential point here is that capabilities like our reasoning and imagination overlap. These are not entirely separate dimensions of human lives, but an integrated part of it—we require both for even a minimally decent life. This spills over into our understanding of reasonableness in law. Nussbaum argues that the reasonable person is not a rational automaton, but a thinking and feeling individual.²⁶ Take the case of a police officer who is called to a dark alley where gunshots have been heard. She sees a figure in the dark that looks like he might be holding a weapon and asks him to stop. He refuses so shoots him fatally only to discover he was unarmed. Nussbaum argues that however tragic the police officer is innocent and this is because what he means to be a reasonable person is a person with anxieties, fears, aspirations and so on.²⁷ Yes, reason is important, but we aim for not rationality but reasonableness—and our emotions are a crucial component of that fundamental aspect of the human condition.

The upshot is that ethical rationalism denies an important part of who we are in conceiving human beings as essentially rationalist. This is because it downplays other important characteristics of human experience. As the neurologist Anthony Damasio argues, the human mind does not operate separately from a body.²⁸ None of us are a brain in a vat. Our emotions and feelings are essential to our reasoning and decision-making—at least from a neurological perspective. To deny it is to reject a part of our physiology. In sum, human beings—and human thinking—is more than pure rationalism. Our emotions matter for our humanity and for how we understand the world. This is because they colour and inform our experiences. Any view about human agency must take into account more than our capacity for rational thinking alone if it is to capture how human beings are agents.

In response, Beyleveld might reject this realist picture—he could deny the claim that our emotions matter in this way and that his account of ethical rationalism insufficiently accounts for them.²⁹ He might claim that rational agents give importance to hope and fear—powerful emotions that are afforded a central place in his account. Their place is in providing motivation for agents to think and act. If not for our having hopes and fears—so Beyleveld’s argument goes—we might remain dormant and motionless. Human agents are rational, but it is our hope and fear that spurs agents to act. Agents act and their chosen purposes require motivation. Some rationally restricted view of emotions might play some part here.

We believe this account of the emotions is too weak. Agents—even rational agents—are human beings with emotions and these will include far more sentiments than only our being hopeful or fearful. There is no clear rationale offered for why these two emotions alone should enjoy the special position they are given, or why other emotions could not be included on similar grounds. Individuals are inspired to think or act for more reasons than their having hope or fear. We might be moved by joy or melancholy, for example. But if only two should

²⁵ Nussbaum n22, at 51-53.

²⁶ M Nussbaum, *Hiding from Humanity: Shame, Disgust and the Law* (Princeton University Press 2004), at 12.

²⁷ Nussbaum n27, at 12-13.

²⁸ See A Damasio, *Descartes’ Error: Emotion, Reason and the Human Brain* (Penguin 2005).

²⁹ See D Beyleveld, ‘Williams’ False Dilemma: How to Give Categorically Binding Impartial Reasons to Real Agents’ (2013) 10 *Journal of Moral Philosophy* 204.

count, we need to know why these two instead of others. We believe there is no such convincing account offered to clarify this distinction.

Nor is it clear that even the stated importance of our having hope and fear a sufficient warrant for concluding they have importance for Beyleveld's account. This is because they count for little. Our having hope is largely an attitude about the future—that there will be a future. Acting like there will be a tomorrow is not clearly an emotional attitude, although it could be in cases of living like there is no tomorrow. It could be an assumption or postulate of moral reasoning. Indeed, Beyleveld's view of hope is described as 'not cognitive' and only 'conceptual'—a universal possibility for any agent. This understanding of emotions fails to acknowledge the cognitive states that emotions exist within and the ways in which they can affect our cognitive appreciation of ourselves in relation to others. Thus the ethical rationalist view of hope is it only gives us 'reason to think', but does not inform what or how we do or should think.³⁰

So emotions—like hope and fear—might be stipulated as important, however they do not play any important role for shaping the way we choose or think. They do not add to the content of what is thought. To say we might posit other agents as motivated by hope and fear is only to claim they are motivated to think and act like us. This says little about the emotions we have and our emotional relation to others—even through our individual hopes and fears. There is nothing about an agent's motivation through hope and fear *as such* that influences the discussion—and it would make no substantive difference for Beyleveld's account if we substituted other motivational emotions—given the limited, and perhaps trivial, role that emotions play.

3. Ethical Rationalism and Sexual Offences

We now show how these problems with the conception of the person and morality raise additional problems for applying ethical rationalism to criminal law relating to sexual offences. In prioritising rationality over emotionality, ethical rationalism may not fully reflect the realities and complexities of human behaviour in relation to sex and provide a comprehensive understanding of why the law regulates sexual behaviour in the way that it does. Indeed, as Beyleveld emphasises, the PGC relates directly to agents and not to human beings, meaning that there is no requirement that agents are humans or gendered beings.³¹ While the PGC is intended to be abstract, the application of it to sexual offences would require explicit recognition of the human context underlying sexual behaviour and the criminal law, which may be difficult given the conception of agency inherent within it, outlined above. Although Beyleveld's (and Brownsword's) more recent work on consent applies Gewirthian principles to the law of consent, this is still in many ways an abstract project that does not fully engage with the actual nature of the law or with the nature of human conduct in our view.³²

³⁰ See the chapter in this book by Düring and Düwell.

³¹ D Beyleveld, 'A Reply to Marcus G Singer on Gewirth, Beyleveld and Dialectical Necessity' (2002) 15(4) *Ratio Juris* 458,

³² Beyleveld and Brownsword, n 1. Despite many examples, including of sexual situations, drawn on in the book, these are not fully fleshed out and the discussion of the application of the PGC to the law remains abstract.

We argue that the emotional complexity of human behaviour in relation to sexual offences means that application of the PGC to this area of law requires careful consideration. Firstly, sex is often intrinsically emotional and thus sexual offences law raises issues regarding how the law conceptualises the harm. Secondly, sexual offences constitute an area of law where issues of gender are prominent and where emotional/rational, body/mind dualisms may play out, but equally where such dualisms have arguably been challenged in recent legal reforms, such that a focus on rationality fails to fully reflect the current legal framework. Thirdly, sexual offences law highlights the problems of a focus on legal moralism in a morally pluralist society where the current legal framework represents a compromise between different moralistic and liberal concerns. We contend that understanding sexual offences requires recognition of the interrelationship between emotionality and rationality and the value of affect. Emotion should play an important role in the law, but in a way that avoids the dangers of legal moralism.³³

A. Emotion and Criminal Law

The role of emotion in the criminal law has been subject to increasing scholarly debate. In particular, there are emerging interdisciplinary literatures that have sought to explore the relationship between law and the emotions. Law and the emotions literatures provide insights into the ways in which criminal law is laden with emotion, thus challenging the traditional rational and objective representations of law.³⁴ Such scholarship has highlighted the problems of describing and understanding the current legal framework if the role of emotions is excluded or marginalised, as well as the ways in which understanding emotion and affective responses can enrich the law.

As Nussbaum and Dan Kahan have highlighted, understanding the role of emotion in criminal law depends on the way in which emotion is conceptualised.³⁵ The history of criminal law reflects wider societal and philosophical debates between a mechanistic view of emotion, which emphasises the demarcation between emotion and cognition and prioritises rationality, and a more evaluative and cognitive approach that recognises that ‘emotion is integral to the process of reasoning’.³⁶ Like other areas of law, criminal law has been influenced by a mechanistic demarcation between rationality and emotion.³⁷ Indeed, individual criminal responsibility is to some extent founded on a model of a rational individual, who is generally in control of his or her emotions. Emotionality has sometimes been constituted in law as an exceptional state, rather than as an intrinsic feature of humanity.

As feminist scholars have critiqued, the influence of the mechanistic demarcation between rationality and emotionality has served to marginalise women in law, as well as having significant racial and cultural overtones. Traditionally the masculine has been associated with rationality and objectivity, whilst the feminine has been associated with emotionality and subjectivity.³⁸ Moreover, ‘the rationalist model of the person ... has been, and really remains, a model of humanity in which a developed capacity for reason is thought to be the most

³³ M Nussbaum and DM Kahan, ‘Two Conceptions of Emotion in Criminal Law’ (1996) *Columbia Law Review* 269.

³⁴ For discussion of the growth of literature in this area see K Abrams and H Keren, ‘Who’s Afraid of Law and the Emotions?’ (2009) 94 *Minnesota Law Review* 1997.

³⁵ Martha and Kahan, n 38.

³⁶ Damasio, n 29 above, 144.

³⁷ A Reilly, ‘The Heart of the Matter: Emotion in Criminal Defences’ (1997) *Ottawa Law Review* 117.

³⁸ R Hunter, ‘Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism’, in M Davies and V Munro, eds, *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013), 13, 14.

important thing about us (it is most humanising, most dignifying, most central to our persons) and therefore tends to be exclusive of many men'.³⁹ Stemming most notably from Cartesian thought, the interrelationship between the emotional/rational and the body/mind dualisms also associates women with the body and embodiment, in opposition to rationality.⁴⁰ 'There is a fundamental sense in which women are constituted as "outsiders" to rationality precisely by being identified with embodiment (and its related emotionality)'.⁴¹ As the liberal legal person has traditionally been constructed in law as rational and autonomous, legal subjectivity has not always been attainable for women.⁴²

Nevertheless, a closer examination of the criminal law reveals the influence of a more evaluative conceptualisation of emotion and the pervasive presence of emotion, illustrating that law is capable of incorporating understandings of emotionality.⁴³ While criminal law may appear to be based on mechanistic underpinnings, it has also been influenced by philosophical and scientific trends that have recognised the interrelationship between thought-processes and emotion. It is impossible to understand certain legal doctrines without incorporating a more evaluative approach to emotions.⁴⁴ For example, the loss of control defence (previously provocation) is based both on the defendant's experience of overwhelming emotion and on an appraisal of the reasonable nature of the emotion.⁴⁵ While the defence may seem to adhere to mechanistic understandings of emotion, in concerning a temporary loss of rationality, it is also based on evaluative understandings that consider the reasonability of the emotional response of the defendant.⁴⁶

The legal framework, including that relating to sexual offences, is based not only on recognition of the role that emotion plays in cognitive processes but also on evaluations of the reasonability of such processes and resultant behaviour. As Nussbaum and Kahan explain, the evaluative conception 'holds that emotions express cognitive appraisals, that these appraisals can themselves be morally evaluated, and that persons (individually and collectively) can and should shape their emotions through moral education'.⁴⁷ In prioritising rationality, ethical rationalism may fail to recognise the extent to which legal processes rely on evaluations of emotional responses and how such evaluations are themselves subject to shifting views of morality: 'Because emotions involve appraisal, the appraisal of those emotions will reflect a society's norms'.⁴⁸ Evaluations of the reasonability of emotional responses in relation to sexual behaviour are, due to their very nature, a product of shifting views of morality. Thus, ethical rationalism may not be able to fully reflect the reality and complexity of sexual offences law and presents dangers regarding its relationship with legal moralism.

³⁹ N Naffine, 'Women and the Cast of Legal Persons' in Jackie Jones, Anna Grear et al, *Gender, Sexualities and Law* (Routledge 2011) 15, 18.

⁴⁰ We note that Beyleveld's thought might not be considered either dualist or materialist. Our thanks to Shaun Pattinson for raising this important point.

⁴¹ A Grear, 'Sexing the Matrix': Embodiment, Disembodiment and the Law: Towards the Re-Gendering of Legal Personality?', in J Jones, A Grear et al, *Gender, Sexualities and Law* (Routledge 2011), 42.

⁴² Hunter, n 43, at 14.

⁴³ Nussbaum and Kahan, n 38.

⁴⁴ Ibid.

⁴⁵ Coroners and Justice Act 2009, s 54

⁴⁶ Nussbaum, n 22, at 38–39.

⁴⁷ Nussbaum and Kahan, n 38, at 274.

⁴⁸ Nussbaum, n. 22, 46.

B. The Role of Emotion in Rape Law

The mind/body, rational/emotional demarcation has historically played out in legal conceptualisations of the harm of rape and the ways in which the law assesses the state of mind of the defendant and the complainant. Exploration of the conceptualisation of the harm of rape in the criminal law illustrates how emotional complexity and emotional harm have traditionally been elided and silenced.⁴⁹ Historically, rape was conceptualised as a crime against property, and indeed the very term ‘rape’ stems from the Latin, ‘rapio’ meaning to steal or ‘carry off’. Rape was traditionally framed as a harm centred on male property ownership over the female body, as evident in the marital rape exception, which existed in English law until 1991.⁵⁰ The feminine association with embodiment and the masculine association with the rational mind therefore traditionally lay at the heart of rape law. However, the conception of rape shifted dramatically in the last century, with a move in the common law away from the focus on physical force to an emphasis on individual consent, illustrating how moral understandings of the wrong rape have been subject to considerable change over time. The focus on consent in the conceptualisation of rape, as confirmed in the Sexual Offences Act 2003, constitutes an important legal development that foregrounds the notion of sexual autonomy. While the concepts of autonomy and consent continue to reflect elements of a mechanistic approach to emotion, in terms of the mind/body, rational/emotion dualisms, they can also be used foreground emotional understandings. Much therefore depends on how concepts of autonomy and consent are conceived.

Autonomy lies at the heart of a rationalist model of legal personhood in terms of the sovereign, rational actor endowed with objectivity and self-possession.⁵¹ In this view, sexual autonomy is ‘the inherent right of the bounded legal person with sovereign control over their bodily property. The wrong of rape then is the invasion and appropriation of that property without consent’.⁵² Such understandings of sexual autonomy tend to presume ‘a particular conception of the subject and an abstract, rational and self-serving framework for the operation of agency’.⁵³ This demarcation between the body and the self focuses the harm of rape on the body and on the violation of sexual autonomy and bodily ownership, thus potentially obscuring the complex emotional harms involved.⁵⁴ Such an understanding of autonomy may result in a failure to reflect the nature of the harm of rape and the experiences of complainants. As Lacey highlighted in relation to rape law prior to the 2003 reforms, ‘At the level of doctrinal construction of criminal wrongdoing, affective experience is, if not absent, more or less invisible behind the veil of rational and abstract legal subjectivity’.⁵⁵

Nevertheless, the focus on consent and sexual autonomy can also enable recognition of the interrelationship between emotion and cognitive processes and can potentially foreground the importance of affective responses in the law. Consent and autonomy are concepts that can

⁴⁹ KK Baker, ‘Gender and Emotion in the Criminal Law’ (2005) 28 *Harvard Journal of Law & Gender* 448, 453.

⁵⁰ This exception, whereby rape within marriage was not recognised as women were deemed to have irrevocably consented upon marriage, was finally addressed in the case of *R v R* [1992] 1 AC 599.

⁵¹ Hunter, n 43.

⁵² Y Russell, ‘Thinking sexual difference through the law of rape’ (2013) 24(3) *Law and Critique* 255, 263.

⁵³ V Munro, ‘Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy’ (2008) 41(4) *Akron Law Review* 923, 928.

⁵⁴ N Lacey, ‘Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law’ (1997) 8(2) *Women: A Cultural Review* 143, 153.

⁵⁵ *Ibid*, 154.

include a more contextual approach and can recognise the ways in which emotions relate to and are influenced by social and interpersonal contexts. Emotions are not simply experienced individually but are socially situated. Indeed, ‘affective responses—as potential signals of what we value—are continually being shaped and informed by the responses of others, and by social and cultural norms’.⁵⁶ Sexual encounters and decisions to engage in sexual intercourse are not made in detached, abstract settings, but are a product of desires, feelings, circumstances and social understandings of sexual behaviour.⁵⁷ While autonomy can be conceived in terms of individual separation and boundedness, it can also be reconceived as a capacity that can be fostered through relationships with others.⁵⁸ Similarly, ‘[c]onsent is a concept which we can fill with either narrow liberal values, based on the idea of the subject as an individual atomistic rational choice maker, or with feminist values encompassing attention to mutuality, embodiment, relational choice and communication’.⁵⁹

Beyleveld and Brownsword have provided us with a comprehensive account of how ethical rationalism and the PGC relates to consent in law. Although their work is not specific to consent in sexual offences, it does include references to rape and does not perceive the need for a different understanding of consent in sexual offences law. While we agree with many aspects of their account, we argue that fuller inclusion of emotionality is necessary in order to reflect the nature of consent in human interactions, particularly in the context of sexual offences. The understanding of consent underlying their account continues to reflect a too narrow focus on individual autonomy—in our view—that prioritises rationality and does not sufficiently reflect the complex emotional elements of consent.

Indeed, their predominant focus on rationality is evident in their inclusion of Gewirth’s requirement that ‘the recipient must be in an emotionally calm state of mind’.⁶⁰ While we would agree that clear emotional distress or anxiety is obviously detrimental to the exercise of consent, we would wish to problematise the idea of emotionality employed here. The fact that emotions are largely absent, at least explicitly, from their discussion of consent and thus only appear in terms of the need for emotional calm, results in a failure to explicitly recognise the inherent relationship between emotions and decision-making. This suggests a general detachment from emotion, rather than recognition of the centrality of emotionality to human behaviour, cognition and experience. This is a problem because such factors count whenever considering the criminal law—and it is unclear how a more restricted view of rationally-bounded emotions offers us a more attractive alternative.

The focus in their account on the need for consent to be both unforced and informed is significant in potentially reflecting a broad conception of consent that examines surrounding context. However, despite the potential to include emotional aspects, this is not explicitly incorporated into the concept of consent that they develop. The understanding of agency and subjectivity at the heart of their account still seems to reflect a focus on human boundedness and an abstract view of human conduct. Indeed, while they obviously recognise that consent operates in relation to others, their account does not encompass an understanding of consent

⁵⁶ Abrams and Keren, n 39, 2071.

⁵⁷ Munro, n 58, at 46.

⁵⁸ J Nedelsky, *Law’s Relations: A relational theory of self, autonomy, and law* (Oxford University Press 2011).

⁵⁹ S Cowan, ‘Freedom and Capacity to make a choice: A feminist analysis of consent in the criminal law of rape’ in V Munro and C Stychin (eds) *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish 2007), 51, 53.

⁶⁰ Beyleveld and Brownsword, n 1, at 128.

that recognises the socially-situated nature of the self and of emotionality. In line with this view of autonomy there remains an emphasis on the responsibility of the (consenting) agent in relation to whether or not the consent is informed, if they act recklessly or carelessly ‘in relation to their own informational field’.⁶¹ While there are obviously merits to this approach we would urge caution in applying this to sexual offences. Given the prevalence of sexual stereotypes and rape myths, there is a danger that it may be overly burdensome on the complainant.

Similarly, there is a need for caution in relation to their approach to the forced/unforced nature of consent. Although it may be in many (or even most) circumstances that ‘positive pressure does not invalidate consent’, to hold that it never does so may be too stringent an approach.⁶² The emotional nature of sexual relationships means that even positive (in the sense of some incentive or inducement) external pressure can be problematic to consent to sex. Such pressure may be exercised in emotional terms, through emotional blackmail and playing on the emotional vulnerability of the complainant. There are also clear gendered implications of not seeing positive external pressure as invalidating consent, given societal stereotypes of male sexual activity (in terms of initiating and pressuring for sex) and female passivity. In terms of negative external pressure (which they argue does invalidate consent), their model allows for recognition of various degrees of pressure, seen through the Gewirthian hierarchy of generic needs.⁶³ However, this hierarchy may fail to recognise the complexities of pressure exercised in relation to sexual offences and the ways in which gendered relations may influence the experience and impact of external pressure. Our point here is not that ethical rationalism is problematic because it has not been applied before to an understanding of sexual offences, but rather our uncertainty about whether it can provide a compelling alternative view of these crimes given the priority of rationality over emotions that it endorses.⁶⁴

The recent reforms to the law of rape in the Sexual Offences Act 2003 illustrate that while a broader approach to consent that includes elements of the wider context is significant, much depends on how the law is interpreted and applied in practice. Indeed, feminist critiques of the law on sexual offences highlight that, despite reforms, the law is often interpreted and applied in ways that delimit recognition of gendered and emotional experiences. In remaining relatively abstract Beyleveld’s (and Brownsword’s) account does not reflect or address these complexities. The 2003 Act provides for the first time a statutory definition of consent, defined in terms of the concepts of ‘choice, freedom and capacity’, under s 74, which in some ways reflect elements of informed consent and an unforced choice. The definition was aimed at providing a more communicative model that encourages attention to agreement between parties and a focus on the choice, freedom and capacity of the complainant to consent.⁶⁵ Rather than focusing on a simple binary of a yes/no decision of whether or not to engage in sexual intercourse, divorced from wider circumstances and emotions, the s 74 definition allows some of the context and emotional complexity surrounding consent to be considered.

⁶¹ Ibid, 145–154.

⁶² Ibid, 135.

⁶³ Ibid, 139.

⁶⁴ Our view takes seriously a point expressed by Beyleveld that there is a difference between what is recognised and what ‘ought to be recognised whether or not they are recognised’. We are not claiming that ethical rationalism cannot offer a view of sexual offences. Instead, our concern is that ethical rationalism does not appear to provide us with a compelling alternative understanding of these crimes if applied to them. See Beyleveld n3, at 15.

⁶⁵ Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (Home Office 2000).

The framework of consent in the Sexual Offences Act 2003 is also based on evidential and conclusive presumptions relating to consent and reasonable belief in consent.⁶⁶ Included within the six circumstances that give rise to a rebuttable presumption of lack of consent (and lack of reasonable belief in consent by the defendant) under s 75 of the Sexual Offences Act, are fear of immediate violence and fear in situations where the complainant is unlawfully detained. As such, understandings of consent have begun to be more explicitly related to emotional responses and behaviours, albeit that there remains a focus on simplistic emotions of fear, rather than more complex emotional states.

However, the broad nature of the concepts of choice, freedom and capacity in the s 74 definition means that while they could be interpreted broadly, they may also be interpreted narrowly, potentially suppressing the significance of the wider contexts surrounding sexual relations and how such contexts impact on the complainant's and defendant's emotional understandings and responses.⁶⁷ Societal attitudes and morality feed into legal processes in terms of juror interpretations of consent and evaluations of complainant and defendant behaviour. This again illustrates the importance of perceiving the social situatedness of emotion and the role of social attitudes, and indeed law itself, in shaping emotional responses and juror evaluations of such responses.⁶⁸ Thus, while the shift in the mens rea of rape from an honest belief in consent to a reasonable belief can be seen to be positive, evaluation of the reasonability of such a belief is inevitably subject to societal attitudes regarding sexual behaviour.⁶⁹ Although we support Beylerveld's and Brownsword's emphasis on an honest and reasonable belief, there is a need to recognise that reasonability can also be problematic in such contexts.

In addition, societal attitudes feed into appraisals of the reasonability of the complainant's emotional responses. Rape complainants may suffer particularly during rape trials due to the failure of legal procedure to directly address the relationship between rationality and emotionality. While the liberal notion of consent presumes a rational, autonomous individual with agency over their actions, the female complainant has historically been portrayed in society as an emotional woman who changes her mind: "no means yes". On the other hand, jurors may expect a degree of emotion from complainants, and may be more inclined to doubt testimony when complainants present an image of rationality and a calm demeanour. Indeed, Ellison and Munro's research on mock jurors illustrates the degree to which a calm demeanour at trial, not reporting the offence immediately and lack of physical resistance during the rape by the complainant can negatively influence juror perceptions and render them less likely to believe the complainant.⁷⁰ Their research indicated that mock jurors who had received education on possible emotional reactions of victims in the aftermath of rape 'were more willing to accept that a "genuine" victim could exhibit few signs of visible distress whilst testifying in court'.⁷¹ This illustrates the importance of foregrounding emotions in the legal treatment of rape, both substantively and procedurally.

C. Legal moralism and the danger of certain emotions

⁶⁶ Sections 75 and 76 deal with the evidential and conclusive presumptions as to consent.

⁶⁷ J Temkin and A Ashworth, 'Rape, Sexual Assault and the Problems of Consent' (2004) *Criminal Law Review* 328.

⁶⁸ Abrams and Keren, n. 39, 2071.

⁶⁹ Sexual Offences Act 2003, s 1

⁷⁰ L Ellison and VE Munro, 'Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials' (2009) *British Journal of Criminology* 363.

⁷¹ Ibid.

While arguing for the legal importance of emotions, we also contend that law needs to be very careful which types of emotion exert influence and to be alert to the shifting nature of moral values. Again, it is important that an evaluative understanding of emotion is employed in order that there is recognition of the role that emotion necessarily plays in the law and of the need for emotions to be evaluated as to their reasonability.⁷² While sexual offences law has traditionally elided the role of emotions, it has also been subject to strong moralistic influences in which certain emotions, such as disgust, have played a significant role.⁷³ In eliding the role of emotions and projecting an image of rationality, law thus hides the moral judgments inherent in it and the ways in which such moralism is itself unstable and subject to shifts over time. It is important that emotions are not viewed as monolithic, as this may serve to perpetuate perceptions of a simple dichotomy between reason and emotion.⁷⁴ Rather, emotions need to be differentiated and evaluated. While some emotions have a positive role to play in law, other emotions are more problematic.⁷⁵

The nature of sexual offences law means that it has inevitably been subject to legal moralism in terms of the criminalisation of certain behaviours. Indeed, the historic criminalisation of homosexuality is a poignant reminder of the influence of legal moralism in sexual offences law. Debates between legal moralism and liberalism have been a feature of this area of law, most notably in the responses to the Wolfenden Report of 1957 and the Hart/Devlin debates. The tensions between legal moralism and liberalism continue to play out in current sexual offences law. Indeed, despite the liberal claims evident within the Setting the Boundaries Review, which led to the Sexual Offences Act 2003, strong elements of legal moralism or ‘quasi-moralism’ are also present.⁷⁶ This can be seen, for example, in the criminalisation of sexual activity between minors (under the age of 16). While these provisions contain some elements of concern to prevent harm to children, the blanket criminalisation of consensual activity between minors also illustrates the influence of moralistic concerns to prevent young adolescents from engaging in sexual experimentation with each other.⁷⁷ Similarly, elements of moralism are evident in the criminalisation of bestiality, in s 69 of the Sexual Offences Act. Indeed, the Setting the Boundaries Review justified criminalisation on the basis that bestiality reflected ‘profoundly disturbed behaviour’ and that ‘society had a profound abhorrence for this behaviour’.⁷⁸

In a culturally diverse society, such as the UK, moral consensus is unlikely, particularly in the area of sexual behaviour.⁷⁹ The obvious danger of legal moralism is its impact on minority groups (and historically on women), whose behaviour may be subject to legal intervention on the basis of the offence taken by a ‘reasonable man’. This is not to argue against the influence of moral considerations *per se*, nor is it to draw a clear demarcation between ‘harm’ and ‘offence’. Indeed, as various commentators have argued, these concepts are far more

⁷² Nussbaum, n 22.

⁷³ Ibid

⁷⁴ Abrams and Keren, n 39, 2035.

⁷⁵ Nussbaum, n 22.

⁷⁶ N Lacey, ‘Beset by boundaries: The Home Office Review of sex offences’ (2001) *Criminal Law Review* 3.

⁷⁷ V Munro, ‘Dev’l-in disguise? Harm, privacy and the Sexual Offences Act 2003’ in Munro and Carl Stychin (eds) *Sexuality and the law: feminist engagements* (Routledge 2007) 1–18, 6–7.

⁷⁸ Home Office, n 57, 126.

⁷⁹ Munro, n 82, at 4.

fluid than is often presented.⁸⁰ Instead, it is to argue that if moral considerations are to play a role then there needs to be careful appraisal of their basis. In particular, the emotional responses inherent in moral judgments need to be opened up and evaluated.⁸¹ The danger of legal moralism is that the emotional responses inherent in moral judgments are not acknowledged and thus are not subject to scrutiny as to their reasonableness. In relation to the Sexual Offences Act the critique is therefore ‘not so much that it betrays its liberal pretensions by criminalising offensive conduct or by intervening into previously unregulated areas of life, but rather that it does so without any examination of the grounds on which underlying determinations of “right” and “wrong” have been made’.⁸² In applying ethical rationalism to the area of sexual offences there is the danger not only that it may obscure the tensions between liberalism and legal moralism inherent in the current law, but also that in obfuscating the emotion underlying moralistic responses it may prevent appraisal of the value of the particular emotion as a basis for legal intervention.

Beyleveld has argued that

Gewirth’s theory is ‘ahistorical’ in the sense that he does not derive the PGC from an assumption of any cultural norms. He derives the PGC dialectically from features that belong to [agents] necessarily, hence universally. These features are ‘transhistorical’ rather than ahistorical (here meaning not attending to the diversity of features of historically existing [agents]), belonging to [agents] regardless of the historical diversity that they manifest. They exist within historical diversity, not outside of it.⁸³

This passage suggests that the PGC provides us with an objective—or at least objectivist—standard by which to make judgements about permissibility concerning generic conditions for agency. It represents a one-size-fits-all that any permissible view about sexual offences should satisfy. To be fair, this does not require all legal communities to possess the same statutes or case law—diversity is permissible provided it is consistent with the PGC’s rationalism. This is an important point. But it is no less significant that our cultural norms inform much of our criminal law today—and not least sexual offences. Nor is it clear that these norms that are born from contingencies—and so may depart from the permissible boundaries set by an objective view of rationality—are mistaken as exposed through the application of the PGC. We do not doubt that the PGC can be used to construct a view of sexual offences, but we are unconvinced that it can provide a compelling alternative to the existing positions we have set out given how sexual offences have developed historically.

4. Conclusion

This chapter raises concerns about ethical rationalism’s relation to both legal theory and legal practices. We argue that rationalism is an important, but not the only or even primary factor in understanding ethical decision-making. We then considered the application of ethical rationalism to sexual offences and highlighted the need for careful consideration in applying the PGC to this area of law. While recognising many of the merits of Beyleveld’s and Brownsword’s approach to consent, we argued for the importance of recognising an evaluative understanding of emotion that reflects the socially-situated nature of autonomy

⁸⁰ See A Duff and S Marshall, ‘How offensive can you get? In Simester and von Hirsch (eds) *Incivilities: Regulating offensive behaviour* (Hart Publishing 2006), 57-90.

⁸¹ Nussbaum, n 23.

⁸² Munro, n 82, at 15.

⁸³ Beyleveld n1, at 157.

and consent. In arguing for the importance of emotionality we also highlighted the dangers of legal moralism and the need to evaluate the merits of legal responses that are founded on emotions. Our conclusion is that ethical rationalism represents an important voice in current debates, but it remains unclear for us that this view can provide a compelling alternative to how we understand certain areas of law like sexual offences—and we welcome more work to help develop this case by taking emotions more seriously.⁸⁴

⁸⁴ Our sincere thanks to Deryck Beyleveld, Roger Brownsword, Stuart Toddington and most especially Shaun Pattinson for their comments on earlier drafts. While we may remain in some disagreement, our chapter has benefited enormously through their feedback for which we are grateful.